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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHRISTOPHER J. REBSTOCK
Petitioner

v.

STATE OF LOUISIANA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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QUESTIONS PRESENTED

1. WHETHER THERE WAS PROBABLE CAUSE SET FORTH BELOW TO JUSTIFY THE WARRANTLESS ARREST OF DEFENDANT.
2. WHETHER A FATHER QUESTIONING HIS OWN SON AFTER THE SON IS IN POLICE CUSTODY VIOLATES THE SON-DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS.
3. WHETHER THE DEFENDANT WAS "CONSTRUCTIVELY INTERROGATED" WITHOUT BENEFIT OF MIRANDA WARNINGS, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

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Christopher J. Rebstock, petitioner herein, through undersigned counsel, prays that a writ of certiorari issue to the Louisiana Supreme Court to review the Judgment and Opinion in the above case entered June 21, 1982.

OPINIONS BELOW

There was no formal opinion of the Twenty-Fourth Judicial District Court of Louisiana, from which this proceeding emanates. Excerpts of the transcript in that Court, including the Judge's statement denying defendant's Motion to Suppress his Confession and minute entries representing the same are reproduced in Appendix B of this petition.

The opinion of the Louisiana Supreme Court has not been reported at this time but is reproduced in Appendix A to this petition.

JURIDSICTION

The opinion and order of the Supreme Court of Louisiana were entered on June 21, 1982. On September 17, 1982, the Louisiana Supreme Court denied the applications for rehearing in this

matter filed by both the defendant and the State, The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (c), because a title, right, privilege or immunity was claimed under the Constitution of the United States, which claim was denied by the Supreme Court of Louisiana.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves sections of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. These are reprinted in pertinent part in Appendix C, attached hereto.

STATEMENT OF THE CASE

On January 10, 1982, Detectives Buras and Hiddings of the Jefferson Parish Sheriff's Office were investigating the murder of Lara Deutsch. She had not returned home after visiting the Rebstock residence. An obscene phone call about a dead girl had also been traced to that residence. The caller allegedly related that he was having sex with a dead girl, and that he had cut her up and put her in a plastic bag. The victim's family gave information which focused

the investigation on Christopher Rebstock. He was the prime suspect. About 4:00 o'clock on January 11, the two detectives went to the Rebsock residence. Earl Rebstock, the father answered the door. He and his wife had been up all night because of Lara, a close friend of their daughter. Both were described as being in a state of shock. The detectives said they had evidence leading toward Christopher, and wanted to question him.

Mr. and Mrs. Rebstock and their son rode to the Detective Bureau in Hiddiggs' police car. Earl Rebstock testified that they had no choice in the matter and had to go with the officers. He ". . . did not think that there was any option . . ." (Tr. 116) Neither officer advised the Rebstocks of their constitutional rights or informed them that they could refuse to go to the Detective Bureau. No questions were asked of Christopher Rebstock at his residence nor was he informed of the purpose of the trip to the Detective Bureau.

When they arrived, Christopher was placed alone in Hiddings' office, and the officers informed

Mr. and Mrs. Rebstock of the information incriminating Christopher. Mr. Rebstock started crying and Mrs. Ann Rebstock became too hysterical to stay in the building. Detectives Buras and Hiddings testified that Mr. Rebstock requested a private conversation with Christopher, while Mr. Rebstock testified that the officers suggested he talk to his son. After a short time alone with his son, Mr. Rebstock emerged from the office and stated: "He just told me he killed Lara." (Tr. 77). It was not until this time that Christopher and his father were given their Miranda rights.

The District Court, in "State of Louisiana vs. Christopher J. Rebstock", No. 82-67, of the Twenty-Fourth Judicial District Court of the Parish of Jefferson of the State of Louisiana, denied the defendant's Motion to Supress his confession herein. The Supreme Court of the State of Louisiana in No. 82 K 0910, overruled the District Court herein and ordered the defendant's confession suppressed. However, the Supreme Court ruled that the defendant's comments to his father

and his father's comment to the police prior to the Miranda warnings being given were admissable.

It is this ruling of the Louisiana Supreme Court, concerning these statements made prior to Miranda warnings being given, that the defendant requests this Honorable Court to review.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED UPON

The Federal questions here presented were specifically raised on April 2, 1982, on a Motion and Hearing to Suppress the Confession of the defendant herein. On that date the Motion was heard, argued, submitted and denied. The defendant then filed for writs of certiorari to the Supreme Court of Louisiana to review this ruling which writ was granted on Apr-l 22, 1982. Arguments on the writ were heard before the Louisiana Supreme Court on May 19, 1982 and a Judgment affirming in part and sustaining in part the ruling of the District Court Judge was rendered on June 21, 1982. The defendants constitutional rights were therefore argued both before the Twenty-Fourth

Judicial District Court and the Louisiana Supreme Court at the earliest and to the most comprehensive extent in the proceedings thus far.

REASONS FOR GRANTING PETITION

I.

WHETHER THERE WAS PROBABLE CAUSE SET FORTH BELOW TO JUSTIFY THE WARRANTLESS ARREST OF DEFENDANT

The Louisiana Supreme Court held that the defendant was under arrest once he reached the Detective Bureau and was placed in Detective Hiding's office. The transcript of the hearing below shows that at this time, the State had only two reasons for suspecting the defendant herein. One, an obscene phone call had been traced to the defendant's residence, and two, the defective questioned the victim's family concerning persons living in the defendant's residence. First, as to the phone call, while the contents of the call make it a cause warranting investigation, there was no sufficient link between the call and the defendant to support placing him under arrest. The only description available of the caller was that he was a white male. Other than the defendant, three people fitting that description regularly use the phone in question. The detectives also had no evidence as to who

else may have had access to that phone. There is a lack of evidence as to when the phone call in question was made, the week before, the month before, the day before? Surely in light of the proximity of the residence where the call was made to that of the victim herein further investigation was called for, but it is not sufficient to be probable cause for arrest.

The extent of the testimony concerning the investigation into this matter is found in the transcript of the hearing below at page 69, lines eight through fifteen, where detective Buras testified that,

> "We questioned the Deutschs in reference to the people or the sons who lived in the house, and, they commented about certain things that happened over the last few months up until the last few weeks concerning Christopher Rebstock, that we thought were questions that had to be answered."

We are not told the extent or the content of the questioning of the Deutschs, if that questioning also raised the possibility of any other suspects or any other information concerning the focusing of the investigation on the defendant. The content of the statements would and should have

required a questioning of the defendant, but the detective chose to do more than simply that. While they questioned others in the neighborhood concerning the crime, none of these were taken to the Detective Bureau. They were questioned in their homes. The defendant herein was the only person brought to the Detective Bureau before being questioned. It is important to note that no questions were asked of the defendant at his home and that he was taken to the Detective Bureau and placed under arrest solely on the basis of the phone call and the Deutschs' statements, the contents of which were not presented to the courts below.

The Louisiana Supreme Court in State v. Collins, 378 So.2d 928, (La. 1980), set forth the following definition of probable cause,

> "Probable cause to arrest exists when facts and circumstance within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution and belief that a person to be arrested has committed or is committing an offense." at p. 930.

The U.S. Fifth Circuit, after citing a similar

definition of probable cause, went on to state,

> "Suspicion and even 'strong reason to suspect' is not adequate to establish probable cause. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959)." United States v. Henry, 604 F.2d 908, 916 (C.A. Fifth Circuit 1979).

While there was certainly sufficient suspicion to question the defendant, it was not sufficient to arrest him.

All evidence that was gained after Christopher's arrest, therefore, is inadmissable at his trial.

> "It is true that any evidence obtained as a result of an unconstitutional and unlawful arrest must be excluded at trial based on the theory that the evidence is the fruit of the poisonous tree. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); State v. Tarver, 324 So. 2d 382 (La. 1975)." State v. Phillips, 347 So. 2d 206, 207 and 208 (La. 1977).

Therefore, should this Court find that the defendant's arrest was not with sufficient probable cause, all of the evidence derived as a result of that arrest is inadmissable. This would include both the defendant's statement to his father and the father's subsequent statement to the police. In choosing to take the defendant

herein to the Detective Bureau prior to questioning him and developing further probable cause, the State violated the defendant's constitutional rights under the Fourth Amendment to the United States Constitution which reads,

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

II.

WHETHER A FATHER QUESTIONING HIS OWN SON AFTER THE SON IS IN POLICE CUSTODY VIOLATES THE SON-DEFENDANT's FIFTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS

The testimony below shows that once the defendant was taken to the Detective Bureau, he was placed in one of the detective's offices by himself. Then, the detective proceeded to inform the defendant's father about their suspicions. At this point, either the detective requested or the defendant's father requested that he be allowed to speak to his son. As of this point and time, the defendant was a minor

placed under arrest, but neither he nor his father had been given warnings consistent with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 671 (1966). While it is clear that the defendant's father is not a police officer, several cases have held that the Fifth Amendment should be applied to private individuals as well as public officers. A Federal District Court has stated;

> "A number of cases have held that the safeguard of the Fifth Amendment against self-incrimination as enforced by the exclusionary rule, extend so far as to render inadmissable against a defendant in a criminal trial incriminating statements involuntarily made by that defendant to a private individual. E.g., United States v. Brown, 446 F.2d 493 (10th Cir. 1972); United States v. Robinson, 142 U.S. App. D.C. 433, 439 F.2d 553 (1970); Evalt v. United States, 359 F.2d 534 (9th Circ. 1966). United States v. Hearts, 412 F. Supp. 880 (N.D.Ca. 1976), at p. 882.

A father questioning his son concerning a criminal offense should at least bring into question the voluntariness of the defendant's confession in this case. The coercion need not be physical but may have been mental as was recognized in Miranda, supra. This Court as early as 1897 questioned, in dictum, coerced confessions

whether made upon an official examination or by a private party. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). It is proper to note at this time the legislative recognition in the Louisiana Civil Code which the State has made concerning the relationship between a parent and child in Louisiana. The Louisiana Civil Code states:

> "Article 216. A child remains under the authority of his father and mother until his majority or emancipation.
>
> In case of difference between the parents, the authority of the father prevails.
>
> Article 217. As long as the child remains under the authority of his father and mother, he is bound to obey them in everything which is not contrary to good morals and the laws."

The voluntariness of Christopher's statement therefore must become circumspect in light of the situation in which he was placed and the fact that it was his father questioning him. The statements made by the defendant to his father at this time, while in police custody, and without being given his Miranda warnings should not be admissable at his trial on the offense for which he is charged herein.

III.

WHETHER THE DEFENDANT WAS "CONSTRUCTIVELY INTERROGATED", WITHOUT BENEFIT OF MIRANDA WARNINGS, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENTS RIGHTS.

Beyond the question of voluntariness addressed in Section II above, the propriety of the procedures followed by the detectives herein calls into question the scrupulousness with which the defendant's constitutional rights were upheld. The defendant and his parents were brought to the Detective Bureau by the Jefferson Parish Detectives. At the bureau, the defendant was isolated by being placed by himself in one of the detective's offices. The defendant's father was then informed of the detective's suspicions. At this time the defendant's father either requested or was requested to speak to his son. This he consented to and after that conversation left the defendant and in a distraught manner stated "He just told me he killed Lara." It was not until this time that the detectives informed the defendant and the defendant's father of their Miranda rights. The issue now raised before this Court is the admissability of those statements, made by the

defendant to his father and by his father to the police during the time after the defendant was arrested and prior to either party being given Miranda warnings.

The actions on behalf of the detectives, allowing the defendant's father to speak with him prior to the Miranda warnings being given, but after he was placed under arrest, is a direct violation of the defendant's Fifth Amendment right against self-incrimination and Fourteenth Amendment right to due process of law. The detective's conduct is clearly "a constructive interrogation" of the defendant. This Court in Rhode Island v. Innis, 100 S.Ct. 1682 (1980), at p. 1689, stated:

> "We conclude that the Miranda safeguards come into play whenever a person in custody or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning but also to any words or action on the part of the police "other than those normally attended to arrest and custody" that the police should know are reasonably likely to illicit an incriminating response from the suspect."

Nothing can be more "likely to illicit an incriminating response" than to inform a juvenile's

parents that you believe their son committed a heinous crime and then have that parent go and speak to his child. This consultation is not only likely to illicit a response from the defendant but, as in this case, the parent may then be subpoened and under penalty of law, made to testify against his child.

Taking this into consideration, a complete picture is now presented for this Court's consideration. The defendant herein was placed under arrest without being questioned by the authorities. The defendant's father was then brought in and informed of the authority's suspicions against his son. The defendant's father then spoke to his son prior to any Miranda warnings being given. After the conversation, the defendant's father left the room wherein he had spoken to his son and made the statement quoted above. The defendant's father was then subpoened before the Grand Jury and questioned concerning the incidents herein. This is not simply a possible scenario, but are the facts of this case presen-

ted, for your consideration. Whether this total course of conduct was premedidated by the authorities or merely came about as an unplanned series of events is irrelevant to the question of the defendant's constitutional rights being violated.

The Louisiana Supreme Court, in its opinion below, held that the defendant herein was not subjected to interrogation as defined in Miranda. Defendant submits that any time actions are taken or committed which involve inculpatory statements being made which are then subject to discovery by the State through its subpoena power an interrogation has indeed taken place. These actions, by the Jefferson Parish Sheriff's Office, are anathema to the spirit, if not the letter, of the Fifth and Fourteenth Amendments. The future consequences of this Court not holding that the situation herein is a violation of those amendments would be the birth of a new police tactic wherein friends and relatives of those under arrest may be used to circumvent the constitutional protection set forth in the Bill of Rights and

interpreted by this Court in Miranda and its progeny.

The statements made by the defendant herein to his father prior to being given Miranda warnings should be held to be inadmissable as they were obtained in violation of the defendant's right not to be compelled to testify against himself. The subsequent statement by the defendant's father should also be suppressed as a fruit of the defendant's statement made after arrest but before he was warned of his Miranda rights.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari and Request for a Stay be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 82-K-0910

STATE OF LOUISIANA

VERSUS

CHRISTOPHER J. REBSTOCK

ON WRIT OF REVIEW TO THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, HONORABLE ROY L. PRICE, JUDGE WATSON, Justice.

Defendant, Christopher J. Rebstock, a sixteen year old juvenile, is charged with the second degree murder of twelve year old Lara Deutsch. LSA-R.S. 14:30.1. The trial court denied a motion to suppress his confessions, and a writ was granted to review the ruling. ___ So.2d ___ (La., 1982).

FACTS

On January 10, 1982, Detectives Buras and Hiddings of the Jefferson Parish Sheriff's office were investigating the murder of Lara Deutsch. She had not returned home after visiting the Rebstock's residence. An obscene phone call about a dead girl had also been traced to that residence. [1]

[1]The caller allegedly related that he was having

The victim's family gave information which focused the investigation on Christopher Rebstock. He was the prime suspect. About 4:00 o'clock on January 11, the two detectives went to the Rebstock residence. Earl Rebstock answered the door. He and his wife had been up all night because of Lara, a close friend of their daughter. Both were described as being in a state of shock. The detectives said they had evidence leading toward Christopher and wanted to question him.

Earl Rebstock said he mentioned calling attorney Bob Evans, a neighbor, but was told legal help would entail search warrants, subpoenas and an "ugly scene". (Tr. 99) Also, according to Rebstock, one detective said: "Mr. Evans does not do that kind of work. He works for the Parish at this time." (Tr. 99) Although Rebstock said the detectives discouraged him from calling a lawyer, he admitted that he could have called one anyway. Detectives Buras and Hiddings said neither the idea of an attorney nor the name of Bob Evans was men-

---

[1] sex with a dead girl, and that he had cut her up and put her in a plastic bag.

tioned.

Mr. and Mrs. Rebstock and their son rode to the detective bureau in Hiddings' police car. Earl Rebstock testified that they had no choice in the matter and had to go with the officers. He ". . . did not think that there was any option . . ." (Tr. 116). Neither officer advised the Rebstocks of their constitutional rights or informed them that they could refuse to go the detective bureau.

When they arrived, Christopher was placed alone in Hiddings' office, and the officers informed Mr. and Mrs. Rebstock of the information incriminating Christopher. Mr. Rebstock started crying and Mrs. Ann Rebstock became too hysterical to stay in the building. She went outside with Lieutenant Claverie. Ann Rebstock had not realized until then that her son was a suspect. She said her son seemed almost "in a transe (sic)" that day. (Tr. 147) Detectives Buras and Hiddings testified that Mr. Rebstock requested a private conversation with Christopher, while Mr. Rebstock testified that the officers suggested he talk to his son.

After a short time alone with his son, Mr. Rebstock emerged from the office and stated: "He just told me he killed Laura (Lara)." (Tr. 77) Christopher was formally placed under arrest for murder.

Mr. Rebstock and Christopher agreed that Christopher would give a statement. Detective Buras started reading a rights form to Christopher and his father at 5:30 P.M. Although Christopher signed an acknowledgment that he had read his rights, he refused to sign a waiver of those rights. His father would not let him sign that part of the form, because ". . . his son did not know what he was doing." (Tr. 73).

Christopher went to a psychologist at one time because of school trouble. At the police station, he told his father:

> ". . . 'You know, dad, I can't go back to De La Salle. You know, I am going to have to go to school somewhere else.' . . . (Tr. 125)

Earl Rebstock did not think his son understood the enormity of the situation. Despite Christopher's failure to waive his rights, a recorded confession

was taken on the advice of Lieutenant Claverie. The statement began at 5:46 P.M.

ASSIGNMENT OF ERROR NUMBER ONE

Defendant contends that he was arrested when the officers brought him to the detective bureau; that the illegal arrest was made without probable cause or a warrant; and that all evidence obtained as a result is tainted.

A confession or inculpatory statement, which is the direct result of an illegal arrest, should be suppressed. Won Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 441 (1963); State v. Edwards, 375 So. 2d 1365 (La., 1979); and State v. Giovanni, 375 So. 2d 1360 (La., 1979).

At the latest, Christopher Rebstock was under arrest when he was placed in Hiddings' office. He reamined there alone for approximately forty-five minutes. Christopher could not reasonably have believed himself free to leave the police station. [2] State v. Menne, 380 So. 2d 14 (La., 1980).

[2]The officers testified that Christopher could have remained at his home but did not say he would have been allowed to leave Hiddings' office.

He was effectively deprived of his freedom of action. State v. Giovanni, supra. Compare Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977). The investigation had focused on Christopher and he was in custody. However, there was probable cause for the arrest. It was not illegal. LSA-C. Cr.P. art. 213 (3).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

As argued in this assignment, the trial court clearly erred, perhaps inadvertently, in finding that Miranda rights were given at the Rebstock home prior to the trip to the detective bureau. Defendant was not informed of his constitutional rights until after he had been formally placed under arrest.

This assignment has merit.

ASSIGNMENT OF ERROR NUMBER THREE

It is contended that questioning of Christopher should have ceased when Mr. Rebstock spoke of calling a lawyer on behalf of his son. Interrogation must cease when an attorney is requested. State v. Rodrigue, 409 So. 2d 556 (La., 1982)

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981).

The trial court made a factual finding that there was no request for counsel. The evidence was conflicting and the trial court's factual finding has support. The trial court did not err in finding that counsel was not requested.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR

This assignment concerns the admissibility of the inculpatory statement made by Christopher to his father, before Christopher was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966). Counsel for defendant argues that the questioning by the father as an agent of the police violates the son's constitutional rights.

Regardless of who suggested the encounter between Christopher and his father, Earl Rebstock voluntarily undertook to question his son. There is no question that Christopher was his primary concern. Although Christopher was in custody at

the time of the conversation, the police had not yet talked to him. The brief conversation with his father was not an extension of police interrogation. " 'Interrogation', as conceptualized in the Miranda opinion, must reflect a measure of compulsion about and beyond that inherent in custody itself". Rhode Island v. Innis, 446 U.S. 291 at 300, 100 S.Ct. 1682 at 1689, 64 L.Ed. 2d 297 at 307. Since Christopher and his father had a short private conversation, free from the presence of the police, he was not subjected to interrogation as defined in Miranda, supra. State v. Rodgers, 207 So. 2d 755 (La., 1968). The statement is admissible.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE

The question raised by this assignment is whether Christopher waived his constitutional rights before making his recorded confession

The prosecution has the burden of proving that a defendant has waived his constitutional rights. Tague v. Louisiana, 444 U.S. 469, 100 S.Ct. 652, 62

L.Ed. 2d 622 (1980). An implicit waiver can suffice. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed. 2d 286 (1979).

Christopher did not confer privately with his father after being advised of his rights. State in the Interest of Dino, 359 So. 2d 586 (La. 1978) requires a "meaningful consultation", 359 So. 2d 594, and it is doubtful that one took place here. Christopher confessed his commission of the crime, but, on the advice of his father, expressly refused to waive his constitutional rights. Compare State v. Hudson, 404 So. 2d 460 (La., 1981) where the juvenile signed a waiver of his rights.

> ". . . Miranda v. Arizona clearly stated the principles that govern once the required warnings have been given.
>
> " "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490, n. 14, 84 S.Ct. 1758, 1764, 12 L.Ed. 2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 453, 58 S.Ct. 1019, 82 L.Ed. 1461

(1938), . . ." 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed. 2d 694." Tague v. Louisiana, 444 U.S. at 470, 100 S.Ct. at 653, 62 L.Ed. 2d at 625 (1980).

Despite the lack of a written waiver, proof of the waiver of constitutional rights can be established by other evidence. State v. Lewis, 315 So. 2d 626 (La., 1975). However, "(T)he courts must presume that a defendant did not waive his rights; the prosecution's burden is great." North Carolina v. Butler, 441 U.S. at 373, 99 S.Ct. at 1757, 60 L.Ed. 2d Ct. 292 (1979).

Christopher acknowledged in his confession that he had been advised of his rights but never stated that he waived those rights. A defendant must understand his rights before a waiver can be inferred. North Carolina v. Butler, supra. There is no evidence that Christopher had the requisite understanding and that there was an implied waiver. The state failed to carry its burden of proving that there was a knowing and intelligent waiver of Christopher's constitutional rights. State v. Brown, 384 So. 2d 425 (La., 1980); Dino, supra. The recorded confession must be suppressed.

This assignment has merit.

For the foregoing reasons the ruling of the trial court is affirmed as to Christopher's inculpatory statement to his father. The trial court's ruling on the motion to suppress Christopher's recorded confession is reversed and the matter is remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

SUPREME COURT OF LOUISIANA

NO. 82-K-0910

STATE OF LOUISIANA

v.

CHRISTOPHER J. REBSTOCK

MARCUS, Justice (dissenting in part and concurring in part)

I disagree with the majority's conclusion that the state failed to meet its burden or proving that defendant knowingly and intelligently waived his constitutional rights. It is not contested that defendant was fully informed of his rights. Defendant's father was present when defendant was advised of his rights. Both agreed that defendant would give a statement. There is nothing in the record that indicates that considering defendant's background, experience and conduct, he did not understand that he was impliedly waiving those rights. North Carolina v. Butler, 441 U.S. 369 (1979). Accordingly, I respectfully dissent from the suppression of defendant's confession; however, I concur in the finding that Mr. Earl Rebstock's statement to the police

of what his son (defendant) told him was admissable.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 82-K-0910

CHRISTOPHER J. REBSTOCK

BLANCHE, Justice (dissenting)

After talking with his son, Mr. Rebstock advised the officers that his son had told him he had killed the victim. The officers then asked defendant's father if they could obtain a statement from him, and the father advised that they could. Thereafter, defendant was brought into the room, with his father present, and advised that he was under arrest. Defendant was then given his Miranda rights, which were read from a form. The form was then given to them both, and read by both. In describing the manner in which he read defendant his rights, the officer stated that he would look at the defendant as he was reading the rights, and ask him if he understood. After a reading of the rights, the officer, discerning that both father and son had understood them, then asked him if he understood. After a reading of

them asked the son to sign the acknowledgment at the bottom of the form. Both Christopher and his father acknowledged that their rights had been given them as evidenced by their signatures at the bottom of the form.

At another section of the form, and below the place where defendant and his father signed the acknowledgment that he had read a statement of his rights and that they had also been read to him by the officer, is another form entitled "Waiver of Rights". That form states, "I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure nor coercion of any kind have been used against me." Because Mr. Rebstock did not believe that his son knew what he was doing, he refused to let him sign the waiver of rights form.

Confronted with the refusal, Officer Buras and Mr. Rebstock consulted with Detective Claverie, the officer evidently in charge of the investiga-

tion. Detective Claverie testified that Mr. Rebstock advised him that he didn't think his son should sign the waiver. Officer Claverie stated that the essence of what he thought Mr. Rebstock said was that he did not think his son fully understood his rights and, for that reason, he did not want him to sign the waiver. The officer then told Mr. Rebstock as follows: "Mr. Rebstock, if you feel that way, don't sign it. Upon conclusion of the colloquy, Officer Buras asked if he should take a statement, and Detective Claverie stated, "Go ahead and take a statement if Mr. Rebstock wants to make a statement." Thereafter, both left. Officer Buras did take a statement, which was never thereafter objected to either the defendant or his father.

One one side of the scale, we have the testimony of Officer Buras, who read defendant and his father the Miranda warnings, that they had indicated verbally to him that they understood their rights. A reading of the acknowledgment states as follows:

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can and will be used against you in court.

You have the right to talk with a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer.

On the other side of the scale, we have a father refusing to permit his son to sign the waiver of rights because he did not think he understood them.

This writer is of the opinion that the mere refusal of the father to permit his son to sign the waiver because he thought his son did not understand his rights does not preponderate on that issue. His rights were explained to him by Officer Buras, and both defendant and his father indicated they understood them. Thereafter, Mr. Rebstock had the option to refuse questioning

but, nevertheless, agreed to the taking of his son's statement. Mr. Rebstock is an intelligent person, as is his son who was a 16 year old high school student attending De La Salle High School in New Orleans. It would seem that they would not have difficulty in understanding the simple meaning of rights which were read to them and rights which they themselves, read.

The sole evidence to indicate that defendant did not understand his rights was the father's refusal to permit him to sign the waiver of rights form and that, to some extent, is equivocal.

This writer is of the opinion that the trial judge was correct in determining that the defendant understood the explanation given to him of his rights, and in denying the motion to suppress. Finally, this writer observes that the majority opinion makes it difficult in the future for this Court to find that an arrestee understood his rights, especially since so many crimes are committed by borderline retardates.

I respectfully dissent.

SUPREME COURT OF LOUISIANA

New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 98

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On September 17, 1982, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

81-C-3074 Succession of Stella Lea Williams
DIXON, C.J., CALOGERO & DENNIS, J.J. would grant a rehearing.

81-C-3265 Reliable Credit Corporation vs. Nathan Smtth and Geraldine Smith
DENNIS, J., would grant a rehearing.

82-K-0073 State of La. vs. Jessie Commodore and Darryl Simms. See Per Curiam.

82-K-0910 State of La. vs. Christopher J. Rebstock. Two Applications. MARCUS BLANCHE & LEMMON, J.J., would grant a rehearing on the state's application.

APPENDIX B

ACTION OF THE DISTRICT COURT

The unrecorded decision of the District Court on the hearing on the defendant's Motion to Suppress his Confession reads in pertinent part as follows:

MR. PORTEOUS: I am going to object, Your Honor, at this point and time. I believe what Mr. Amato is going into, did they have sufficient evidence to, in fact, made an arrest. But, I am still going to object because the purpose, 1: Was a voluntary statement taken from the defendant? And, if it was taken, was it a knowing and intelligent waiver made of the rights, and not what information we have prior to even picking up-

MR. AMATO: Your honor, the only problem with the Motion to Supress is that at the time the Motion to Suppress was filed, I had no Discovery available to me. It is general enough, that I feel, that I can go into the probable cause to arrest the defendant. And, then, it becomes a question of when the arrest

took place, and the probable cause they had to go to the Rebstock's home at approximately 4:00 o'clock on January 11.

THE COURT: Mr. Amato, the Court agreed with Mr. Porteous that the purpose that we are here is on the Motion to Suppress this confession. The only issue that are involved is that was the confession really given and was the defendant advised of his rights. Now, it might well be that what you are doing is you are crossing over into your other Motion to Suppress the Evidence. We are not doing that now.

MR. AMATO: Your Honor, the law provides if there was not probable cause to make an arrest, that anything that flows from that is fruit of the poisonous tree.

THE COURT: I understand that.

MR. AMATO: And, that, if the time this officer went to the Rebstock home to place the defendant under arrest, and did not have sufficient probable cause to place him under arrest, then anything that flows from there irrespective of waiver of rights, etc., is the fruit of

the poisonous tree and not admissable into Court. I think the Court has my argument.

THE COURT: I am well aware of your argument with respect to the fruit of the poisonous tree. However, I say to you again that we are here on the Motion to Suppress the Confession. The issues that are involved here, so far as to the Motion to Suppress with respect to advisement of the rights of the accused, and also whether or not the confession was voluntary. Now, out of an abundance of caution, and because of the situation that is involved here with respect to your other Motion to Suppress Evidence, I am going to allow you to go into the questions that you are attempting to raise at this point.

MR. AMATO: Thank you, Your Honor.

THE COURT: However, I will expect you to stay within the boundaries that we have set here; that we are talking about the arrest.

MR. AMATO: What I am talking about is the probable cause they had to arrest the defendant.

Then, the crucial question of the Court becomes, "at what time did the arrest take place?"

Transcript pages 64-67.

Other than the above quoted exchange, the record is void of any evidence of any consideration by the Trial Judge of the question of probable cause to arrest the defendant.

APPENDIX C

The Fourth Amendment to the United States Constitution reads in pertinent part,

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution reads in pertinent part,

> "No person shall be held to answer for a capitol or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopard of life or limb; nor shall be compelled in any criminal case to be a witnees against himself, nor be deprived of life, liberty, or property, without due process of law;

nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution reads in pertinent part,

"Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

PROOF OF SERVICE

I, Jacob J. Amato, Jr., one of the counsel of record for Christopher J. Rebstock, despose and say that on the day of November, 1982, I served three copies of this Petition for Writs of Certiorari on an Assistant District Attorney for the Parish of Jefferson, State of Louisiana, by hand.

All parties required to be served have been served.

JACOB J. AMATO, JR.
AMATO & CREELY
901 Derbigny Street
P.O. Box 441
Gretna, Louisiana 70054
Telephone: (504) 367-8181

Subscribed and sworn to before me, at Gretna, Louisiana, this day of November, 1982.

Notary Public